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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1960

No. 134

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY L. FOSTER,
PETITIONERS

VS.

COMMERCIAL CREDIT CORPORATION,
RESPONDENT

PETITION OF EXECUTOR, SORGEL, FOR REHEARING OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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William J. Sorgel, Executor of the Estate of William R. Sorgel, Deceased, petitions this Honorable Court for rehearing of his petition for a writ of certiorari in the above captioned cause, and in support thereof represents to the Court:

Petitioner restricts this petition for rehearing to one substantial ground available to him, which was not presented in the petition for a writ of certiorari, and consequently was not before the Court when it was denied.

QUESTION PRESENTED

Whether a federal court has jurisdiction of an action removed from a state court by a nonresident defendant where

(a) no separate and independent claim or cause of action against the removing defendant was averred, and the plaintiff sought and asked for only one recovery from one set of facts bringing about its single injury,

(b) prior to trial the plaintiff dismissed the nonresident removing defendant, with prejudice, thereby eradicating the sole basis for federal jurisdiction.

STATUTES INVOLVED

28 U.S.C.A. Sec. 1441(c). Actions removable generally —

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

28 U.S.C.A. Sec. 1332(a)(1). Diversity of citizenship; amount in controversy —

"(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy . . . is between:

"(1) Citizens of different States."

STATEMENT

Commercial Credit filed this suit on July 1, 1954, in the Circuit Court, Milwaukee County, Wisconsin, against Wil-

liam R. Sorgel (since deceased and the executor of his estate substituted), Dorothy L. Foster and Robert Howard as joint and several guarantors of a contract that had existed between it and Howard Distributing Corporation. The defendant, Dorothy L. Foster, had the cause removed to the United States District Court for the Eastern District of Wisconsin, on account of her diversity of citizenship, and it was thereafter transferred by that Court, for convenience of the parties, to the United States District Court for the Western District of Texas. (R I, 2-4)

The principal obligor, Howard Corp., was not named, or sued as a defendant. (R I, 5; VI, 1301)

William R. Sorgel was at the time the suit was instituted, and his estate still is, a resident of Ozaukee County, Wisconsin. (R I, 2-4,5) The defendants, Dorothy L. Foster and Robert Howard, were both residents of Texas. (R I, 2)

In its original complaint, Respondent sought and prayed for judgment, "against said defendants and each of them in the sum of $53,766.71, together with interest and the costs and disbursements of this action." (R VI, 1301-3)

On June 4, 1956, prior to the trial, the Respondent dismissed, with prejudice, its suit against the Texas defendants, Dorothy L. Foster and Robert Howard, over the objection of, and after contest by, the defendant, Sorgel. (R I, 3).

Following the dismissal of the Texas citizen, Dorothy L. Foster, the defendant, Sorgel, filed his motion to remand or dismiss the suit and same was denied by the District Court on September 30, 1957. (R III, 543)

Prior to dismissal of the Texas defendants and before the first trial of this action, the defendants in this suit, on January 13, 1956, filed a suit, identical to that set forth in the counterclaim herein, in the District Courts of Texas, at San Antonio, against this Respondent and other parties, and

issue therein was joined. The suit is still pending. Respondent herein is also required in that suit to prove and establish its claimed indebtedness against these defendants. (R. III, 541-2)

After the dismissal of the Texas defendants, Foster and Howard, Respondent filed its third amended complaint averring it was, "still complaining of defendant William R. Sorgel, but no longer complaining of Mrs. Dorothy L. Foster and Bob Howard." (R. I, 5) And sought and prayed for judgment against the defendant, William R. Sorgel, only. (R. I, 15)

The same claim, cause of action and injury are alleged in the complaint on which Respondent went to trial as were alleged in its original complaint. (R. I, 5-15; VI, 1301-3)

In response to Respondent's third amended complaint, the defendant, Sorgel, filed his answer and counterclaim, and proceeded to trial and judgment without waiving, but still insisting upon his objections to the jurisdiction of the federal court and his motion to remand or dismiss; and, further averred that the complaint failed to state a cause of action upon which relief could be granted against him, and "that this Court has no jurisdiction of the claim and cause of action attempted to be asserted by Plaintiff herein." (R. I, 16-36)

ARGUMENT

Lack of federal jurisdiction is asserted upon the grounds that, (a) no separate and independent claims or causes of action were present at the time of removal, and (b) prior to trial the Respondent dismissed the nonresident removing defendant, Foster, with prejudice.

Petitioner, Sorgel, had no part in removing this cause to the federal courts; such was the sole act of Texas defend-

ant, Foster. (R. I, 2) Prior to trial the defendant, Sorgel, filed his motion to remand or dismiss and upon denial of same he proceeded to trial and judgment subject to, and still insisting upon, his objections to the jurisdiction of the federal courts. (R. I, 16-32; III, 543)

Petitioner's objections to jurisdiction will be presented in the order above stated.

I. Was the case one which could be removed under *28 U.S.C.A. Sec. 1441 (c)?*

First, we must look to Respondent's original complaint to determine whether a separate claim or cause of action was present at the time the cause was removed by the Texas defendant, Foster. *Pullman Company v. Jenkins*, 305 U.S. 534, 59 S.Ct. 347; *Preas v. Phelps*, 195 F. 2d 61; *Preston v. Kaw Pipe Line Co.*, 128 F.2d 162; *Sewell v. J. E. Crosbie, Inc.*, 127 F. 2d 599.

When we examine Respondent's original complaint, as well as the one on which it went to trial, it is found there is alleged only a single wrong, to-wit, the failure of Howard Corp to repay its advancements and a prayer for only one recovery arising out of that one fact. The original complaint, concluding, "plaintiff demands judgment against said defendants and each of them for the sum of," etc.; and, the amended complaint concluded with a prayer for judgment against the single defendant, Sorgel. (R. I, 5-16; VI, 1301-3) We do not believe Respondent will take issue on this point because in its reply to Petitioner's motion challenging jurisdiction it plead, "Plaintiff admits the original complaint did not show separate and independent claims or causes of action against the several defendants."

The complaint showing on its face that no separate claim or cause of action was alleged against the Texas defendant,

Foster, she did not have the right to remove this case from the state courts of Wisconsin to the federal courts, under *Sec. 1441 (c)*. The federal courts, therefore, acquired no jurisdiction of this civil action. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534; *Snow v. Powell*, 189 F.2d 172 (C.A.-10); *Willoughby v. Sinclair Oil & Gas Co.*, 188 F.2d 902 (C.A.-10); *Edwards v. E. I. Du Pont de Nemours Co.*, 183 F.2d 185 (C.A.-5)

In the *Finn* case, *supra*, this Honorable Court said:

> "The petition concluded with a prayer for joint and several judgment against the three defendants . . . (as did the original complaint in this action) . . . It cannot be said that there are separate and independent claims for relief as § 1441(c) requires. Therefore, we conclude there was no right of removal."

2. Assuming, *arguendo*, the federal courts acquired jurisdiction in the first instance, was same destroyed when Respondent dismissed the nonresident removing defendant?

Even if there had been separate and independent claims and causes of action alleged against the three defendants, when Respondent dismissed the removing defendant the separate and independent claims for relief ceased to exist, and the defendant, Sorgel, who had been involuntarily brought into federal court, was entitled to have the case against him dismissed or returned to the state courts, and, he timely so moved. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586; wherein Justice Roberts said:

> *"In the case of a separable controversy, if, after removal, the plaintiff discontinues or dismisses as to the defendant who removed, so that there no longer exists any separable controversy, the cause must be remanded.* If a cause be removed on this ground the whole case, including the controversy between citizens of the same state, is taken over by

> the Federal court only because one or more of the defendants is entitled to invoke its jurisdiction. The basis of Federal jurisdiction failing, it is proper that the remaining parties, who were involuntarily taken into Federal court, should, upon the cessation of the separable controversy which was the cause of their transmission to another tribunal, have their case returned to the state court." (Emphasis added)

Inasmuch, as the same parties here have joined issue on the identical claim and cause of action in the Texas courts, this suit should be dismissed rather than remanded to the Wisconsin courts. *Employers Reinsurance Corp v. Bryant*, 299 U.S. 374, 57 S.Ct. 273; *Polhemus v. American Medical Assn.*, 145 F.2d 357 (C.A.-10).

3. There remain only the questions of whether the defendant, Sorgel, invoked the jurisdiction of the federal courts by filing the compulsory derivative counterclaim and by proceeding to trial and judgment in the federal courts; and, whether this Honorable Court can consider the question of jurisdiction at this stage of the proceedings.

The Howard Corp. had been dissolved by judicial forfeiture of its charter on October 24, 1955. (R. I, 36, 40) Robert Howard, its only officer and director at the time of dissolution, refused to initiate the compulsory counterclaim. (R. I, 35, 40)

As to the first question, the defendant, Sorgel, brought the counterclaim in his capacity as a shareholder of the principal obligor, Howard Distributing Corporation, and not in his *individual* capacity, specifically pleading, "William R. Sorgel, in the representative capacity hereinafter stated, and in such capacity only, and Dorothy L. Foster, . . . hereinafter called counter plaintiffs, suing herein as common

stockholders of the Howard Distributing Corporation and all like stockholders of said corporation . . ."; concluding with a prayer for, "judgment in favor of and for and on behalf of the Howard Distributing Corporation, and its stockholders, against counter defendant, Commercial Credit Corporation, in the sum of $65,158.87, together with interest and for all costs of suit." (R. I, 34-6) The shareholder, Sorgel, was compelled to initiate this counterclaim. *Rule 13, F.R.C.P.*

Although Respondent's suit was against Sorgel in his individual capacity, as distinguished from his representative capacity as a shareholer of the principal obligor (R. I, 5-15), his joinder in the derivative counterclaim, as such a shareholder, could not give the federal courts jurisdiction of the claim for personal judgment against him. *Koster v. Lumberman's Mutual Casualty Co.*, 330 U.S. 518, 67 S.Ct. 628:

> "The cause of action which such a plaintiff (stockholder) brings before the court is not his own but the corporation's. It is the real party at interest."

On the second question, when Sorgel filed his answer and the derivative counterclaim and proceeded to trial and judgment he did so subject to, without waiving but insisting upon, his objections to the jurisdiction of the federal courts, as well as his motion to remand or dismiss; and, reiterated, "that this Court has no jurisdiction of the claim and cause of action attempted to be asserted by Plaintiff herein." (R. I, 16)

The Trial Court having previously denied his motion to remand or dismiss and overruled his objections to jurisdiction (R. III, 543) he had no choice, under the circumstances, but to proceed.

That Sorgel did not waive his objections challenging jurisdiction nor voluntarily invoke the jurisdiction of the

federal courts by his actions after denial of, and subject to, his objections and motion to remand or dismiss, is too fundamental to require citation of authority other than *Rule 12 (h), F.R.C.P.*

With respect to the final proposition, this Honorable Court has spoken so forcibly upon the subject it should be well settled, that the jurisdiction of the federal courts may be challenged at any stage of the proceedings. *M. C. & Lake Michigan Ry. Co. v. Swan*, et al, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed 462; *Clark v. Gray*, 306 U.S. 583, 59 S.Ct. 744; *Empire Coal Co. v. Empire Coal Co. of Tenn.*, 150 U.S. 159, 14 S.Ct. 66; *Cleveland Insurance Co. v. Globe Insurance Co.*, 98 U.S 336; 25 L.Ed. 201.

In the *Swan* case, *supra*, *this* Honorable Court said:

> "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, in this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it . . . it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is, not what either of the parties may be allowed to do . . . when it appears on the record, by a plea to a jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the court is . . . to reverse such a judgment for want of jurisdiction . . . Where it is shown, negatively; . . . that jurisdiction does not exist."

See also: *Lang v. Patent Tile Co., Inc.*, 216 F.2d 264 (C.A.-5); *Fennell v. John Hancock Mutual Life Ins. Co.*, 177 F. 2d 737 (C.A.-5).